IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10298 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYANTILAL RATILAL PATEL - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :
MR HM PARIKH for Petitioner(s) : 1,
MR REETA CHANDARANA, AGP for Respondent(s) : 1,
RULE SERVED to Respondent(s) : 2,
MR BY MANKAD for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 21/04/2006

CAV JUDGMENT

1.In the present petition, the petitioner a retired employee of Nadiad Municipality-respondent no.2 herein has prayed for a direction against the Municipality and its Chief Officer to make the payment of difference of pensionary benefits considering the petitioner's basic

pension at Rs.3603/- as on 31-12-1995 and revised pension at Rs.8914/- with effect from 1-1-1996. The petitioner has also prayed for periodical increments in Dearness Allowance on his basic pension on the aforesaid basis with arrears.

2.The petitioner was appointed as an Overseer by the respondent no.2-Nadiad Municipality in the year 1965. He received his periodic due promotions and finally he was discharging his duties on the promotional post of Town Development Officer from which post he opted for voluntary retirement with effect from 30-09-1994. Upon his retirement, the petitioner was paid his pension, gratuity and other retiral benefits as per the rules and regulations prevailing at the relevant time.

2.1 It is the case of the petitioner that as per the rules and regulations adopted by the Nadiad Municipality for its employees who joined the service after 1-4-1959, a pension scheme was applicable. The petitioner was accordingly governed by the pension scheme.

2.2 It is further the case of the petitioner that

the State Government vide its resolution dated 20-01-1998, accepted revision in the existing pay structure of the employees including the pensionary benefits being paid to the retired employees. The revised pay rules were brought into effect from 1-1-1996. The revisions were brought into effect by Gujarat Civil Services (Revision of Pay) Rules, 1998. As per the provisions of the said rules, for the employees who had opted for voluntary retirement, revision in the pay would be on the notional basis and on the basis of the pay so fixed notionally, his pension would be regulated. In this regard, the petitioner relies on Government Resolution dated 20-1-1998.

2.3 Since the Nadiad Municipality was not giving the benefits of the Revision of Pay Rules of 1998, some of the aggrieved employees approached this Court by filing Special Civil Application No. 6180/1999. This Court disposed of the petition by order dated 20-08-1999 providing that the representation of the petitioner therein will be considered by the Government. In response to the representation so made, the Government passed an order on 22-10-1999 providing that Municipality shall implement Government

Resolutions relating to payment of pension with increased D.A.. Consequential directions were also given. Since the order of the Government was not being implemented, the petitioner of the said Special Civil Application moved a note for revival of the petition. Ultimately, an order came to be passed on 10-05-2000 wherein a statement was made on behalf of the Municipality that they will comply with the directions given by the State Government.

2.4 It is thus the case of the petitioner that his right to seek the revised pension as per the Revision of Pay Rules of 1998 got crystallized. There was no further possibility of debate and the employer-Nadiad Municipality had to revise the pension of the petitioner accordingly.

2.5 It is the case of the petitioner that despite representations and communications by the petitioner, respondents no. 2 and 3 have not released the difference in pension payable to the petitioner. It appears that an attempt was made to make out a case that non payment of the difference in pension to the present petition would amount to contempt. However this

Court found that no case for contempt has been made out which was recorded in an order dated 05-03-2003 passed in Misc. Civil Application No. 1191/2001. The petitioner therefore, filed the present petition seeking reliefs as noted in the earlier portion of this order.

2.6 It is the case of the petitioner that his revised pensionary benefits have been withheld illegally and without proper authority.

3. The respondents no. 2 and 3 have filed affidavit in reply opposing the petition. In his affidavit dated 14-04-2005, respondent no.3 has stated inter-alia that at the time of retirement of the petitioner, his pension was erroneously fixed at Rs.3603/- per month on account of mistake by the Municipality. It is stated that while calculating the basic pension, instead of taking into consideration the average of last 10 months for actual basis pay, in case of the petitioner by mistake his total salary was taken into account including the allowances. It was the case of the said respondents that to arrive at a correct basic pension of the petitioner only his basic pay was required to be taken

into account and allowances payable on such basic pay ought to have been ignored. On account of such a mistake instead of the correct basic pension of the petitioner which should have been at Rs.1796/- per month, basic pension of the petitioner was fixed at Rs.3603/- per month. It is further the case of the Municipality that considering the basic pension of the petitioner at Rs.1796/- per month, on the date of his retirement as per the revised pay rules of 1998, his consolidated pension would come to Rs.5334/- per month. It is therefore, suggested that the claim of the petitioner for receiving the pension at Rs.8914/- per month with effect from 1/1/1996 is not justified. It is further stated that the Municipality will consider the consolidated pension of the petitioner at Rs.5334/- per month from 1-1-1996 and will pay the arrears, if any, to the petitioner according to the said calculation. It is stated that auditor has objected to wrong fixation of pension of the petitioner. It is therefore, denied that the petitioner is entitled to claim arrears as prayed for.

4. The petitioner has sought to controvert the averments made by the Municipality in its affidavit in reply. The

petitioner has filed affidavit in rejoinder dated 15-09-1005. Primarily, it is stated that there was no error in fixation of the pension of the petitioner on the date of his retirement. In this regard it is stated that there was a Reference I.T. No. 174/74 filed before the Industrial Tribunal which came to be decided on 10-04-1975. One of the demands namely demand no.6 was pertaining to pension and other allowances. It was agreed between the parties with respect to demand no.6 that the Municipality shall merge 100% D.A. in the pay for the purpose of calculation of pension and House Rent Allowance and for deduction of contribution towards Provident Fund and payment of contribution of the Municipality with effect from 1-2-1975. It is further stated that yet another Reference I.T. No. 200/77 came to be decided by the Tribunal pursuant to which for the purpose of calculating Pension, Gratuity, Provident Fund and House Rent Allowance, full amount of D.A. shall be added in the pay. The said award in Reference I.T. No.200/77 was passed by the Tribunal on 9-3-1978. It is thus the case of the petitioner that the Municipality did not commit any error in calculating his basic pension on the date of his retirement and not just his basic pay but other

allowances were also required to be and correctly taken into account for fixing his pension. In the said rejoinder, the petitioner has also given instances of other employees of the same Municipality in whose cases similar benefits have been granted and no steps have been taken to modify the pension entitlements of such employees. In particular following averments have been made by the petitioner in his rejoinder in this regard :

> “11. I say that one Mr. Vinodrai Naik, retired from service w.e.f. 31.12.1996, i.e. after coming into effect of the revised pay scale. His pay in the revised pay scale in December, 1996 was Rs.10300/- and D.A. Was Rs.412/-. His total pay was Rs.10712/-. His ten months average pay was Rs.10527.20. Hence 50% of the said amount, i.e. Rs.5263.60, was fixed as his pension and his service was only for 31 years, his monthly pension was fixed at Rs.4944.50. In the same way, one Mr. Jagdish Desai retired from service on 30.11.1995 before the date of coming into effect of the revised pay scale. His basic salary in November, 1995 was Rs.1500/- and D.A. Was Rs.2142/-. His last 10 months average pay was Rs.3630.50 and 50% of the same being Rs.1815.25 was fixed as his monthly pension. As he had completed 33 years of service, his pension was fixed at Rs.1816 per month. Similarly, one Ambalal Dalwadi retired from service on 30.11.1991 prior to retirement of the petitioner. His basic salary in November, 1991 was Rs.1500/- and D.A. Was Rs.900/-. His last 10 months average salary was Rs.2332.50 and 50% of the same is Rs.1166.25. He had also completed 33 years of service and hence his pension was fixed at Rs.1167/- per month. Annexed hereto and marked as ANNEXURE R-2 COLLECTIVELY are the copies of pension calculation papers of said three persons. “

5.To the said rejoinder statement filed by the petitioner, respondent no.3 has filed a sur-rejoinder dated 03-03-2006. The factum of the orders passed in the above mentioned industrial disputes and its effect have not been seriously controverted. What is however sought to be suggested is that when the petitioner accepted the benefits of fourth revised pay scale with effect from 1-1-1986, the award passed by the Industrial Tribunal in Reference I.T. No. 200/77 ceased to be applicable. It is the case of the Municipality that upon acceptance of the revised pay scale with effect from 1-1-1986, the petitioner expressly waived his rights flowing from the said award. It is therefore, contended that awards passed by the Tribunal in Reference I.T. No. 174/74 and Reference I.T. No. 200/77, have no relevance after 01-01-1986 with implementation of fourth pay commission recommendations. It is also contended that as per the definition of “pay” and “pensionable pay” as contained in Rule 9(39)(a) and Rule 9(41) respectively of BCSR, the demand of the petitioner for fixing of his pension on the basis of his basic pay inclusive of allowances is not justified. It is also sought to be suggested that due to financial crisis, the petitioner is unable

to weigh any further burden towards pension.

6. Having heard the learned advocates appearing for the parties and having perused the material on record, it can be seen that so far as basic pension of the petitioner on the date of his retirement is concerned, the same was admittedly fixed by the Municipality at Rs. 3603/- per month. There is no dispute about the fact that the petitioner is entitled to benefits of revision of his pension as per the Revision of Pay Rules of 1998 brought into effect from 1-1-1996. This aspect has also not been seriously disputed by the Nadiad Municipality.

6.1 There is also no dispute about the fact that earlier the fixation of the pension of the employees of the Municipality was governed by the awards passed by the Industrial Tribunal in Reference I.T. No. 174/74 and Reference I.T. No. 200/77. Combined effect of the said awards was that for the purpose of fixation of pension for a retiring employee of the Municipality, not only his basic pay, but certain other allowances were also required to be taken into account. It was precisely because of this reason that Municipality

fixed the basic pension of the petitioner at Rs.3603/- per month considering not only his basic pay but also other allowances which were required to be taken into account for fixation of pension. The case of the Municipality however, is that the fixation of the pension of the petitioner was a mistake. That his pension ought to have been fixed taking into account only his basic pay.

6.2 It is the case of the Municipality that with implementation of the revision in pay of the employees of the Municipality, pursuant to acceptance of fourth pay commission recommendations with effect from 1-1-1986, the terms of the awards passed by the Industrial Tribunal ceased to apply. It is the case of the Municipality that the petitioner having exercised his option for receiving pay and allowances as per revised pay scale with effect from 1-1-1986, the awards of the Industrial Tribunal in question had lost its efficacy and the petitioner had specifically waived his right to have his pension fixed according to the terms of the said References.

7.As against this the case of the petitioner is that

there was no waiver on his part. That in case of similarly situated employees, the Municipality has fixed their pension and revised pension by taking into account not just the basic pay but other permissible allowances.

8. I am unable to countenance the stand of the Municipality. There is nothing on record to suggest that for receiving benefits of revised pay scale with effect from 1-1-1996, pursuant to acceptance of fourth pay commission recommendations, the employees of the Municipality and in particular the petitioner had to make a conscious choice. Nothing has been pointed out to suggest that for availing the revised pay scale, the petitioner had to forgo the rights flowing from the awards passed by the Industrial Tribunal in Reference I.T. No. 174/74 and Reference I.T. No. 200/77. The stand of the Municipality that with revision in pay from 1-1-1986, the rights flowing from the above mentioned awards stood nullified, cannot be accepted. Additionally, the petitioner has also correctly pointed out that in case of similarly situated employees, the Municipality has given the benefits, both of the pension fixation pursuant to the awards passed by the

Industrial Tribunal as also the revision of pension pursuant to the revision of pay rules, 1998. Though after the rejoinder statement filed by the petitioner, the Municipality has filed a sur-rejoinder, the averments of the petitioner that in case of similarly situated other employees the Municipality has adopted different formula, has not been specifically met with. The Municipality has also not come out with specific instances whereby all employees covered by the revised pay scales with effect from 1-1-1986 for fixation of their pension, only basic pay is taken into account, though it is a specific case of the Municipality that upon introduction of the revision in pay with effect from 1-1-1986, the awards passed by the Tribunal in Reference I.T. No. 174/74 and Reference I.T. NO. 200/77 stopped applying.

9. It can thus be seen that no case has been made out by the Municipality to hold that pension of the petitioner was incorrectly fixed at the time of his retirement and that therefore, the petitioner cannot get the corresponding revision in his pension with effect from 1-1-1996 on account of Revision of Pay Rules of 1998. The petitioner is therefore, entitled to receive

direction for payment of revised pension with arrears on the basis of his basic pension being Rs. 3603/-.

10.In view of the above discussion, I find that the petitioner has made out a good case. The respondents no. 2 and 3 i.e Municipality and its Chief Officer are directed to recalculate the pension of the petitioner as on 1-1-1996 on the basis of his basic pension being Rs. 3603/- per month. On the basis of such calculation, the petitioner shall receive the revised pension with effect from 1-1-1996. The arrears of pension shall be paid to the petitioner with simple interest at the rate of 7% p.a. from the date same fell due and payable till its actual payment. This entire exercise shall be completed within a period of four months from the date of receipt of a copy of this order.

11.With these directions, the petition is disposed of. Rule made absolute to the above extent with no order as to costs.

(Akil Kureshi,J.)

(raghu)